***Currier v. Virginia,* 2018 WL 3032406, 535 U.S. __ (June 22, 2018)**

Currier was indicted for burglary, grand larceny, and unlawful possession of a firearm by a convicted felon. Because the state could introduce evidence of his prior burglary and larceny convictions to prove the felon-in-possession charge, Currier agreed to a severance and asked the court to try the burglary and larceny charges first, followed by a second trial on the felon-in-possession charge. He was acquitted at the first trial and then tried to stop the second trial on double jeopardy grounds. The trial court rejected his arguments and his conviction was affirmed on appeal in state court. SCOTUS affirmed.

- A defendant who agrees to have the charges against him severed and considered in two separate trials waives a double jeopardy claim and also waives issue preclusion.

The Court noted that *Ashe v. Swenson,* 397 U.S. 436 (1970) forbids a second trial only if to secure a conviction the prosecution must prevail on an issue the jury necessarily resolved in the defendant's favor in the first trial. A second trial is not precluded simply because it is unlikely that the original jury acquitted without finding the fact in question. Rather, to say the second trial is tantamount to a trial of the same offense as the first and thus forbidden by the Double Jeopardy Clause, the Court must be able to say that it would have been irrational for the jury in the first trial to acquit without finding in the defendant's favor on a fact essential to a conviction in the second. But even bearing all that in mind, the Court noted there was a critical difference between this case and *Ashe* – even assuming Currier's second trial qualified as the retrial of the same offense under *Ashe*, he consented to the second trial. The Double Jeopardy Clause is not violated when the defendant elects to have offenses tried separately and persuades the trial court to honor his election. This is not a case where the defendant had to give up one constitutional right to secure another; instead, Currier faced a lawful choice between two courses of action that each bore potential costs and rationally attractive benefits. Difficult strategic choices are not the same as no choice, and the Constitution does not forbid requiring a litigant to make them. The Court further held that civil issue preclusion principles cannot be imported into the criminal law through the Double Jeopardy Clause to prevent parties from retrying any issue or introducing any evidence about a previously tried issue. Such an argument is refuted by the text and history of the Double Jeopardy Clause and by SCOTUS cases such as *Blockburger*. The Court further noted that it was not even clear that civil preclusion principles would help defendants like Currier, and that grafting civil preclusion principles onto the criminal law could also invite ironies such as making severances more costly and thus less freely available.

https://www.supremecourt.gov/opinions/17pdf/16-1348_h315.pdf